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NY Rent Recovery Case Adds Structure To Overcharge Claims

By **Deborah Riegel and Ethan Cohen** (April 23, 2020, 4:30 PM EDT)

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On April 2, the New York Court of Appeals issued a landmark opinion of industrywide significance for building owners. The court held that Part F of the Housing Stability and Tenant Protection Act of 2019 cannot be applied retroactively so as to subject building owners to new or increased liability for past conduct, because doing so would unconstitutionally infringe on owners' substantive due process rights.

The opinion decided four rent overcharge cases that were consolidated on appeal. Each case involved an apartment that was treated as deregulated during the owners' receipt of J-51 tax benefits, prior to the Court of Appeals' 2009 decision in Roberts v. Tishman Speyer Properties LP, wherein the court concluded that luxury deregulation was unavailable during the receipt of J-51 tax benefits.

The four cases before the Court of Appeals were:

- Matter of Regina Metro. Co. LLC v. New York State Division of Housing & Community Renewal,[1] in which the tenants took occupancy in 2005 at a market rent of $5,195 per month and filed an overcharge claim in 2009;
- Raden v. W7879 LLC,[2] in which the tenants took occupancy in 1995 at a market rent of $2,350 per month and filed an overcharge claim in 2010;
- Taylor v 72A Realty Association LP,[3] in which the tenants took occupancy in 2000 at a market rent of $2,200 per month and filed an overcharge claim in 2014; and
- Reich v. Belnord Partners LLC,[4] in which the tenants took occupancy in 2005 at a market rent of $18,500 per month and filed an overcharge claim in 2016, more than six years after the landlord registered the apartment as rent-stabilized following the Roberts decision.

On June 14, 2019, after leave to appeal was granted in all four cases, the Legislature enacted the HSTPA, making sweeping changes to the rent laws.

As relevant here, Part F of the HSTPA drastically changed the method for determining rent overcharge claims, substantially expanding the scope of an owner's potential liability by, among other things, (1)

eliminating the four-year look back rule and permitting the court to consider an apartment's entire rent history; (2) expanding the recovery period from four to six years; (3) eliminating the statute of limitations, providing that an overcharge claim can be filed "at any time;" (4) expanding the recordkeeping requirement for owners from four years to six years, and providing that the failure to maintain records, even beyond six years, is at the owner's peril; (5) expanding the treble damages penalty for willful rent overcharge from two years to six years; and (6) making the award of attorney fees mandatory, rather than discretionary.

After the HSTPA's enactment, the tenants in the subject four appeals argued that the amendments contained in Part F of the HSTPA should be applied retroactively to their pending appeals, despite the fact that the alleged overcharges resulted from conduct that occurred prior to the enactment of the HSTPA.

The Court of Appeals rejected the tenants' arguments and held that the rent overcharge amendments contained in Part F of the HSTPA unconstitutionally infringed on the owners' substantive due process rights if applied retroactively to past conduct and overcharges occurring prior to the enactment of the HSTPA. Rather, the court held that overcharge claims must be resolved pursuant to the law in effect when the purported overcharges occurred.

While recognizing the Legislature's prerogative to implement policy, the court explained that "retroactive application of the overcharge calculation amendments would merely punish owners more severely for past conduct they cannot change — an objective we have deemed illegitimate as a justification for retroactivity."

The Court of Appeals decision has many farther-ranging implications of significance to owners. While a lengthier summary is required to explain the substance and consequences of every issue addressed, certain critical holdings are highlighted below:

Statute of Limitations

The HSTPA does not apply retroactively to revive an overcharge claim that was time-barred at the time the HSTPA was enacted. Thus, a rent overcharge claim that was barred by the four-year statute of limitations is not revived by the HSTPA and is forever barred if not asserted prior to June 14, 2019.

Four-Year Lookback Rule

In rent overcharge cases concerning overcharges or conduct alleged to have occurred prior to the enactment of the HSTPA (June 14, 2019), the overcharge claim must be resolved pursuant to the law in effect at the time the alleged overcharge occurred.

In addition, for those claims, the rent actually charged and collected on the date four years prior to the filing of the overcharge complaint is the base date rent, and overcharges must be determined by increasing the base date rent by legally permitted increases during the four-year recovery period. Use of the reconstruction method or the sampling method discussed by the Appellate Division in Taylor and/or Regina is improper.

Review of rental history outside the four-year lookback period is permitted only in the limited category of cases where the tenant produces evidence of a fraudulent scheme to deregulate the apartment and, even then, solely to ascertain whether fraud occurred. Review outside of the four-year lookback period is not permitted for calculation of the base date rent or to permit recovery for years of overcharges barred by

the statute of limitations.

With respect to claims of overcharge and deregulation related to the Roberts decision, the court clarified that willfulness means "consciously and knowingly charging improper rent," such that a finding of fraud (or willfulness) is generally not applicable in post-Roberts cases, where owners relied on incorrect guidance from DHCR in luxury deregulating apartments, explaining that conduct cannot be fraudulent without being willful.

Recordkeeping Requirement

Under pre-HSTPA law, absent fraud, the base date rent is inviolable, and an owner will not be required to produce records, including individual apartment improvement records, for a period more than four years prior to the assertion of the overcharge claim.

Treble Damages

For rent overcharge claims that arose prior to the enactment of the HSTPA, an owner will not be liable for the expanded six-year treble damage period, and, with respect to Roberts cases, reliance on DHCR's prior rulings will insulate an owner from a finding of willfulness.

Conclusion

The landmark opinion provides necessary stability and a framework within which tenants' claims can more predictably be evaluated. Most importantly, following the enactment of the HSTPA, owners and lenders were significantly hampered in performing due diligence for acquisition and lending purposes.

The Court of Appeals has now settled the law on critical issues that directly affect building owners' potential liability for past conduct, providing a more definite method for evaluating rent rolls and determining the potential exposure to rent overcharge claims. The opinion should also provide more certainty for litigants and more consistency in the courts, given the framework set forth by the Court of Appeals.

Deborah Riegel is a member and Ethan Cohen is of counsel at Rosenberg & Estis PC.

Disclosure: The authors of this article successfully represented the owners in Reich v. Belnord Partners, LLC in all phases of the action, including before the Court of Appeals.

[1] Matter of Regina Metro. Co.LLC v. New York State Div. of Hous. & Community Renewal (164 AD3d 420 [1st Dept 2018]).

[2] Raden v. W7879LLC (164 AD3d 440 [1st Dept 2018]).

[3] Taylor v 72A Realty Assoc., L.P. (151 AD3d 95 [1st Dept 2017]).

[4] Reich v. Belnord Partners, LLC (168 AD3d 482 [1st Dept 2019]).